Editor's note: Appealed – aff'd, sub nom. Multiple Use, Inc. v. Morton, Civ. No. 71-211 (D Ariz. Nov. 9, 1972), 353 F. Supp. 184, aff'd, No. 73-1218 (9th Cir. Oct. 2, 1974) 504 F.2d 448

UNITED STATES
v.
SILVERTON MINING AND MILLING CO., INC.

IBLA 70-22 Decided September 23, 1970

Mining Claims: Discovery

To constitute a valid discovery upon a gold placer claim there must be shown to exist within the limits of the claim a valuable deposit of the minerals which would warrant a prudent man in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine, and in making this determination, the Secretary may consider whether there is a reasonable prospect that the gold can be extracted, removed, and marketed at a profit.

Mining Claims: Discovery

Evidence of mineral deposit which is sufficient only to warrant further exploration is not enough to establish a discovery under the mining laws.

Mining Claims: Common Varieties of Minerals

Mining claims located prior to July 23, 1955, for common varieties of building stone or sand and gravel are valid only if they meet all the requirements of the mining laws, including discovery, prior to that date.

Mining Claims: Discovery

The economic value of common varieties of sand and gravel and building stone found on a gold placer claim and not locatable under the mining laws cannot be considered in the evaluation of the value of the gold to determine whether there has been a discovery of a valuable deposit of gold on the claim.

IBLA 70-22 : Arizona Contest No. 034305

UNITED STATES	:	Placer mining claim held
v.	:	null and void
SILVERTON MINING AND MILLING CO., INC. (Now Minerals Technology, Inc.)	:	Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Silverton Mining and Milling Co., Inc. has appealed to the Secretary of the Interior from a decision dated December 4, 1968, of the Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of a hearing examiner declaring the Robe-Roye-Martin-Missing Link placer mining claim null and void for lack of a valuable mineral deposit.

The mining claim covers 103.18 acres located in parts of sections 5 and 8, T. 13 N., R. 1 W., G&SR Mer., Arizona, within the Prescott National Forest.

The claim was originally located as three separate claims. The Robe Roye, covering 20 acres, was located in 1896 by J. M. Green. Next came the Martin, also for 20 acres, located in 1915 by Sam Boblett. Then in 1933 A. B. Peach and Ziba O. Brown located the approximately 40-acre Missing Link. By mense conveyances E. J. and Pearl Schreck, in 1949, acquired a partial interest in each of the claims. In 1957 the Schrecks bought a quiet title action which established them as "the owners of the whole interest in fee simple" of these three and other mining claims. In 1962 the Schrecks filed a "Notice of Mining Location Amended" which combined the three claims into an association placer claim of 160 acres. The notice named the locators of the three claims and added those of Dorothy O. Peach, Ida H. Brown, and the Schrecks. It increased the area of the amended claim to 160 acres. It also said that the interest of all the locators had been quieted in the Schrecks in 1957. On October 13, 1962, the claim, as amended, was conveyed to Dale Moran, who with Sally Moran conveyed it on October 31, 1963, to the Silverton Mining and Milling Co., Inc. Finally on September 23, 1964, Silverton filed an amended location notice in the same form as the first one but reducing the acreage claimed to 103.18 acres. On October 6, 1964, Silverton filed an application to patent, Arizona 034305, alleging that the claim contains a valuable mineral deposit of gold, sand and gravel. The contest complaint was initiated at the request of the Forest Service, United States Department of Agriculture.

At the hearing, held in Prescott, Arizona, on December 12, 1966, the issues were resolved to two:

(1) whether the claim contains acreage in excess of that allowed by the mining laws; and

(2) whether there is a mineral deposit of sufficient value on the claim to meet the requirement of the mining laws.

The hearing examiner concluded that the Robe-Roye-Martin-Missing Link claim could be valid for at most 40 acres and held the claim void as to the excess. He found that the Schrecks had created a single claim by their amended location and by so doing had limited themselves to 20 acres each or 40 acres for both.

In accordance with a prior designation by the appellants, the forty acres remaining in the claim were part of the former Robe Roye and Missing Link claims.

The hearing examiner then summarized the testimony offered relating to the mineral deposits on the claim. It appears that the claim is located along the Lynx Creek in the Walker Mining District. After gold was discovered along the creek as early as 1863, it became a very productive placer gold stream, yielding some $2,000,000 in gold production, most of which was obtained either between 1863 and 1885 or between 1932 and 1942. In the latter period there were eight to ten dredging operations along the creek, including one in the area covered by the claim. (Ex. 4.) 1/

The area of the claim was sampled by government mining engineers, who in the course of their examination took 38 samples, 20 of which were to bedrock. Of these, one sample assayed at $0.93 per cubic yard and another, containing a nugget but no other gold assayed at $11.65 a yard.

The contestee offered several witnesses to establish the value of the claim as a gold placer. The most important evidence consisted of the reports, attached to the patent application, of Donald P. McCarty, a mining engineer who had examined the claims in 1961 and 1963. Of his ten samples, 9 were substantially below the cost of production, accepted as $0.50 per cubic yard. One, a 123 lb. sample containing a 19-cent nugget resulted in an assay value of $7.389 per cubic yard. The hearing examiner pointed out that of the several areas containing placer materials on the claim only one, containing 13,000 cubic yards, assayed at more than the cost of production, and that in this area in which the nugget was found, the other two samples taken were valued at $0.04 and $0.146 per cubic yard. He also noted that most of this gravel deposit was outside the 40 acre area selected for retention by the contestee if its claim was to be reduced to 40 acres.

1/ The reference is to the exhibits of the hearing. Other similar references will be to the transcript submitted at the hearing which will be cited as Tr.

The hearing examiner found that there were not sufficient values left in the claim to justify an extraction operation.

As to non-metallic minerals, he found that there was no evidence that a substantial amount of stone had been removed from the claim, and that, in fact, about one truckload per week had been removed in the period from 1946 to 1957 for which the person holding the claim had been paid $0.50 or $9 per year per claim.

He also found that no sand and gravel had been removed from the claim prior to July 23, 1955.

He pointed out that the act of July 23, 1955, 30 U.S.C. § 611 (1964) excluded common varieties of sand, stone, and gravel from location under the mining laws, so that a discovery based on a deposit of one of those materials had to have been made prior to the date of the act.

He concluded the stone was a common variety and that there had not been a discovery prior to July 23, 1955. He then held the claim invalid.

On appeal, the Bureau of Land Management affirmed the hearing examiner. It stated that a claim could be valid only for the acreage properly within it at the time of discovery, that the amended location notice filed by the Schrecks in July 1962 was an original location of two locators and so limited to 40 acres. It further held that if there were no discovery until after the Schrecks transferred the claim, their successors as individuals could hold only 20 acres within a single claim.

After reviewing the evidence it concluded that none of the land within the 103.18 acres amended mining claim had been shown to contain a discovery of a valuable mineral deposit which would satisfy the test for discovery.

On appeal to the Secretary, the contestee first disputes the ruling that the amended location is an original location and asserts that it is not to be deprived on any rights obtained through the three original locations. We concur in the Bureau of Land Management's conclusion that the areal extent of a claim depends upon its ownership at the time of discovery. However, in view of the Bureau of Land Management holding that there was no discovery on any part of the amended claim, with which we agree, there is no need to determine whether the claim could be valid for 20 or for 103.18 acres. If there now is no discovery sufficient to validate the claim, 2/ then it does not matter what area the locator says the claim covers for the claim is invalid whatever its extent. Cf. United States v. Melluzzo, 76 I.D. 160, 181, 186 (1969).

2/ As to date up to which discovery must be maintained, see United States v. Estate of Alvis F. Denison, 76 I.D. 233, 251-255 (1969).

Next the contestee asserts that it established by a preponderance of the evidence that a discovery has been made on the mining claim.

The test for a discovery of a valuable mineral deposit under the mining law has often been stated. A discovery has been made when a mineral deposit has been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. United States v. Coleman, 390 U.S. 599 (1968). In determining whether a mineral deposit is valuable, the Secretary may require a showing that there is a reasonable expectation based upon the circumstances known at the time that the mineral can be extracted, removed, and marketed at a profit -- that is that it is marketable at a profit, United States v. Coleman, supra; Converse v. Udall, 399 F2d 616 (9th Cir., 1968); United States v. Jenkins, 75 I.D. 312, 318 (1968). It need not be proved that the claim can in fact be operated at a profit, but the evidence as to the costs of mining may be considered in determining whether a person of ordinary prudence would be justified in the further investment of labor and capital. Converse v. Udall, supra; United States v. New Jersey Zinc Company, 74 I.D. 191 (1967).

The Government's witnesses testified that the gold values found in gravel deposits on the claim did not constitute a discovery. In their opinion only small areas were suitable for placer operations, specifically that only 2654 cubic yards of gravel contained an estimated gold value of $2,664.31.

The contestant relied mainly upon reports of a geologist, Donald P. McCarthy, which were submitted as supplements to its patent application. The first McCarthy report (Exhibit A, patent application) consolidated its samples into four areas. For three areas the values were given as $0.168, $0.045, and $0.113 per yard, while the fourth area was listed as containing 31,000 yards of gravel valued at $0.421 per cubic yard. These values of themselves do not amount to a discovery.

The report then stated that virgin gravels were sampled below the dredged gravels and water was encountered. The samples, it continued, collected from under water, ranged in value from $0.60 to over $6.90 per cubic yard. The report then concluded:

> "These values are very good and warranted additional testing beneath the dredge tailings to ascertain the extent and grade of the virgin gravels."

The report recommendation is merely one suggesting further exploration. This is not enough for a discovery. Evidence which is sufficient only to warrant further exploration is not sufficient to meet the "prudent man test" necessary to establish a valid mining claim. Henault Mining Company v. Tysk, 419 F2d 766 (9th Cir., 1969).

The second McCarthy report was thoroughly analyzed by the hearing examiner and has been summarized above.

This evidence, as the decision below held, is not sufficient to establish a discovery of a valuable mineral deposit on the claim.

That the contestant itself had some doubts is indicated by its insistence, through one of its witnesses and in its briefs, that the claim should be evaluated on the basis of a combined gold, stone, and sand and gravel operation rather than on the basis of gold alone. Tr. 162.

We agree with the conclusions reached in the prior decisions that the sand, gravel and building stone on the claims are common varieties and that there was not a discovery of a valuable deposit of either material within the meaning of the mining laws prior to July 23, 1955.

The contestant's assertion that since the claims were located prior July 23, 1955, the sand, gravel, and building stone deposits need not be other than a common variety is without merit. The act of July 23, 1955, supra, is applicable to mining claims located before that date, but not perfected by a discovery prior thereto. United States v. Melluzzo, supra.
Under the circumstances, the sand and gravel and the building stone on the claims cannot be of avail to the contestee in evaluating the claim as a gold operation. A locatable mineral must support a discovery on its own without assistance from the economic value of a non-locatable one. United States v. Chas. Pfizer & Co., Inc., 76 I.D. 331, 348 (1969).

Accordingly, there having been no discovery of a valuable mineral deposit within the limits of the claim, it was properly declared invalid and the patent application rejected.

Finally, the contestee has requested an opportunity for oral argument. The request is denied. The issues having been thoroughly examined in the briefs submitted, an oral presentation would be of no assistance in the desposition of the appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081) the decision is affirmed.

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Martin Ritvo, Member

I concur: I concur:

_____ _____
Stuebing, Member Francis Mayhue, Member

Edward W.